In The

SUPREME COURT OF THE UNITED [illegible]

No. 352, October Term, 1945

COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS,

v.

THE UNITED STATES OF AMERICA

PETITION FOR [illegible]

ALFRED D. RAUH,
County Attorney of [illegible]

WALTER R. JOHNSON,
Attorney General of [illegible]

H. EMERSON KNOWLES,
Deputy Attorney General,
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SUPREME COURT OF THE UNITED STATES

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COUNTY OF THURSTON IN THE STATE OF NEBRASKA, ET AL., PETITIONERS,

V.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING

ALFRED D. RAUN,
County Attorney of Thurston County,
WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
Counsel for Petitioners.

Come now the above named petitioners and present this, their petition for a rehearing of the above entitled cause, and in support thereof respectfully say:

The very serious situation in which the court's decision leaves the people of Thurston County, Nebraska, and their local governmental subdivisions impels us to make this further effort in their behalf. We are encouraged to ask for a rehearing by the sincere conviction that when certiorari is granted and it becomes necessary for any member of this court to actually write an opinion in this case he will find it impossible, after an argument upon the facts and a review of the law to write one which will satisfy him as to logic, law and equity without reversing the lower court.

This court has taken two positions which are diametrically opposed to each other.

The first position was adopted and has been followed as a matter of course from the time our government was formed and is succinctly stated in the case of *State Tax Commissioner of Utah* v. *Malcom P. Aldrich, et al.*, 316 U. S. 174, 86 L. Ed. 1358, as follows:

> "The taxing power is an incident of government. It does not derive from technical legal concepts. The power to tax is coextensive with the fundamental power of society over the persons and things made subject to tax. Each State of the Union has the same taxing power as an independent government, except insofar as that power has been curtailed by the Federal Constitution.
>
> "The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: (1) no State can, without the consent of Congress, lay any imposts or duties on imports or exports, except as necessary for executing its inspection laws, Art. I, Sec. 10 (2); (2)

> no State can, without the consent of Congress, lay any tonnage duties, Art. I, Sec. 10 (3); and (3) by virtue of the Commerce Clause, Art. I, Sec. 8 (3), no State can tax so as to discriminate against interstate commerce."

The position above stated is so clearly right that there is no possibility of anyone disagreeing with it. It is as though the court had held that the tide ebbs and flows twice in twenty-four hours or that the United States Capitol has two wings and a dome and is constructed of stone.

The court's second position, which cannot be right if the first position is correct, was taken in connection with the law passed by Congress on May 19, 1937, 50 Stat. 188, which provides in part as follows:

> "Sec. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided*, That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; *And provided further*, That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead."

This law unquestionably purports to limit the taxing power of the states. The limitation is not permitted in any of the existing exceptions.

In the case of *Board of County Commissioners* v. *Seber*, 318 U. S. 705, 87 L. Ed. 1094, this court held that Congress did have the power to limit by that statute the taxing power of the states. A careful examination of the Seber case will show that the reasoning is specious and that there is no foundation in the Constitution nor the cases cited for the decision as pointed out in our original brief filed in connection with petition for writ of certiorari, pages 39 to 47, inclusive.

In the present case the lower court felt constrained to follow the Seber case as indicated in the opinion beginning at the bottom of page 82 of the Record, as follows:

> "During the pendency of these cases the major constitutional issue appears to the court to have been determined with finality in favor of the plaintiff. The issue has been squarely presented; and it has been held that the action of the Congress in according lands of this character the privilege of exemption from state taxation is within its legislative power, and that the two cited sections are constitutional. Board of County Commissioners v. Seber, 318 U. S. 705, 63 S. Ct. 920, 87 L. Ed. 807; * * *.
>
> "The Supreme Court having thus unequivocally affirmed the validity of the statutes under consideration, it would be altogether presumptuous for this court to examine, or assume to sustain, its conclusion. And that will not be undertaken. * * *"

Following that, the lower court, on page 94, added a further error by holding that to qualify as a "homestead" under this statute land must only,

> "(a) have been purchased before May 19, 1937 out of the trust or restricted funds of individual Indians; (b) be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior; (c) be selected for designation as a homestead by its owner or owners with the approval of the Secretary of the Interior; (d) be not more than a total of one hundred and sixty acres in extent, if agricultural and grazing lands, or cost not more than $5000.00, if urban property."

Under this definition, which will be treated as tacitly approved by this court unless certiorari is granted, the following could result: A five thousand dollar saloon or a flour mill or a race track, if urban property, could be designated as a homestead and taken off of the state tax rolls; likewise, 160 acres of rural property good for nothing but the growing of wild rice and muskrats. Some lands were actually held exempt which come as near being homesteads within the congressional intent as those above mentioned.

The holding that Congress has the power to exempt from state taxation land owned in fee simple by any class of individuals, whether it be Indians, Negroes, Irishmen, postmasters or any other class group, and the court's definition of "homestead" seem to us to be as clearly wrong as if the court had solemnly held that the tide ebbs and flows only once in twenty-four hours or

that the United States Capitol is shaped like an apple and is constructed of green cheese.

We are not trying to be funny. We make these comparisons sincerely and with all due respect. We do, however, feel very deeply that the court was wrong and that it owes it to itself as well as to the people of Thurston County, Nebraska, to carefully review the law and the facts and correct this error. The people of Thurston County, Nebraska, and their local subdivisions do not deserve to have this unfair, discriminatory and inequitable burden fastened upon them.

The root of the whole trouble is in the Seber decision. If the result in that case was right under the facts peculiar to it, it was not right under any theory that the Federal Constitution granted the power, but only because of a combination of three circumstances. First, the Oklahoma enabling act reserved in Congress the power to legislate fully as to land owned by Indians; second, the people of Oklahoma in their Constitution granted this right to Congress; and third, the Supreme Court of Oklahoma in the case of *Wynn* v. *Fugate*, 149 Okla. 210, 299 Pac. 890, held that under the law of Oklahoma Congress did have the power to remove from state taxation land owned in fee by Indians.

The thesis upon which the Seber decision is based seems to be that the United States is morally bound to provide for the Indians, and, having taken over that duty, Congress has a "paramount power" or an "undoubted power" to pass any kind of a law necessary to carry out that duty. This reasoning is specious. In the

first place, Congress has no source of power outside of the Constitution; in the second place, the Indians can be given everything and anything that Congress desires to give to them without interfering in the slightest degree with the power of the states to tax the property owned by private individuals within their borders. In other words, if necessity can be considered a source of power, it must be taken into consideration that there is no necessity for taking the property of one class of citizens off of the tax rolls, thereby shifting their tax burden to their neighbors or depriving the local government of needed support. The Congress instead can appropriate the money out of the federal treasury to pay the taxes if they see fit.

Suppose Congress should decide that the Indians should have a practical education in state government and that under the "paramount power" or "undoubted power" theory they would pass a law providing that the Nebraska Unicameral Legislature and the various state offices are instrumentalities of the federal government and only Indians could be elected thereto so that they could be properly educated in government. Could such a law be deemed necessary and within the power of Congress? On the face of it that is absurd. How much more absurd is it, however, than to hold that Congress has a power "not expressly granted in so many words by the Constitution" but "its existence cannot be doubted," to deprive a state and its local subdivisions of the power to tax uniformly all the real estate owned in fee simple by private citizens within their borders, thus depriving them of financial support indispensable to their continued existence.

The rule of stare decisis does not stand in the way of overruling an earlier erroneous decision. The Supreme Court has often overruled its earlier decisions upon taking into account the lessons of experience and the force of better reasoning. Many cases support this view. See Notes 2, 3, and 4 to the dissenting opinion of Mr. Justice Brandeis, Mr. Justice Roberts, and Mr. Justice Cardozo in the case of *Burnet* v. *Coronado Oil and Gas Co.*, 285 U. S. 404, 76 L. Ed. 823.

In *Barden* v. *Northern P. R. Co.*, 154 U. S. 288, 38 L. Ed. 992, the court said:

> "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."

This is especially true in cases involving the Federal Constitution where correction through legislative action is practically impossible. In the instant case, even though it were practicable to correct the court's decision by a constitutional amendment, it would be difficult to word an amendment which would more clearly limit the power of Congress to remove from state taxation real estate owned in fee simple by individuals than the Constitution already contains.

For the foregoing reasons, it is respectfully urged that a rehearing be granted and that a writ of certiorari be issued out of and under the seal of this honorable court, in compliance with the original petition filed herein, and that the decree of the lower court be reversed.

Respectfully submitted,

ALFRED D. RAUN,
County Attorney of Thurston County,

WALTER R. JOHNSON,
Attorney General of Nebraska,

H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
Counsel for Petitioners.

CERTIFICATE OF SERVICE.

I, H. Emerson Kokjer, one of the counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

H. Emerson Kokjer